WHEN EQUITY WILL ENJOIN A SPORT AS A PRIVATE NUISANCE.

In *Bispham's Principles of Equity,* §438, a nuisance is defined to be, "an act unaccompanied by an act of trespass, which causes a substantial injury to the corporeal or incorporeal hereditaments of another." And in the same section, distinguishing between a public and a private nuisance, the learned author says, "A private nuisance is an injury to the property of an individual." These definitions, comprehensive in their terms, constantly present to Courts of modern equity jurisprudence the question, what act constitutes such an injury to the property of an individual as to invoke the enjoining power of a Court of equity? This proposition opens for investigation a broad and extensive field and gives rise to a considerable diversity of opinion.

A recent case, *Foor v. Edwards,* 90 N. E., (Ind.), 785, held that a roller skating rink, wherein those who participate in the sport pay admission, is not a nuisance *per se,* but under the circumstances of the case, where the tenant on the floor beneath the skating rink was engaged in the retail clothing, furnishings, and shoe business, an injunction would issue to prevent the loss of customers and profits, such injury being irreparable.

Closely following the rule laid down in *Foor v. Edwards, supra,* the Pennsylvania Courts, in a similar case, hold that a laundry is not a nuisance *per se,* but when operated in the basement of a building, the first floor of which is occupied by a vendor of soft drinks, it may become a nuisance by emitting steam, heat, and stench which causes a loss of customers, injury to the soda fountain and other fixtures, and sickness to the employes of the plaintiff who occupied the first floor. *Warwick v. Wah Lee & Co.,* 10 Phila. (Penn.), 160. Many Courts recognize the doctrine that a business lawful in itself may be conducted in such a manner as to become a nuisance. So in *Boston Ferrule Co. v. Hills,* 159 Mass., 147, complainants were manufacturers of ferrules on the third floor, defendants manufacturers of glass on the fourth floor of a building. Sands, acids, and fumes passed through unprotected holes in defendants' floor and injured complainants' machinery on the floor beneath. Failing to abate the nuisance upon request, a bill of relief was filed, whereupon the Court enjoined such use of defendant's property as to injure the property of complainant. But an injunction was refused in *Medford v. Levy,*

rented rooms from plaintiff and lived on the same hall way, 31 W. Va., 649, where plaintiff alleged that defendant's wife, who maliciously and intentionally swept trash and dirt into the hall; let fumes and odors escape from the kitchen into the hall; and so conducted herself as to injure the health of plaintiff's wife. Relief was refused, it appearing that plaintiff's wife was also guilty of misconduct.

The principles enunciated in the foregoing decisions are followed in a series of interesting cases in which the cause of the injury is more remote and the damage more consequential.

The Court in *Barfield v. Putzel,* 92 Ga., 442, held that a licensed saloon is a legal business and not a nuisance *per se.* Accordingly, the Court refused to issue an injunction to prevent defendant from establishing a saloon under the offices of a dentist, who for thirteen years had practiced in the offices, and whose patients consisted largely of women and children. But the New Jersey court, appreciating the nature of such a business, places limitations upon the rights of the proprietor of a saloon. Thus, *Feeney v. Bartoldo,* 30 Atl. (N. J.), 1101, concurring with the essential principles in *Warwick v. Wah Lee & Co. supra,* and *Boston Ferrule Co. v. Hills supra,* declares that a lawful business may become a nuisance. And where the proprietor of a saloon next to plaintiff's residence keeps a piano which is played every night until eleven o'clock, and the crowd assembled dance and sing, rendering it impossible for plaintiff to sleep, an injunction will issue to prevent the use of the piano after nine o'clock. But the Kentucky Court in *Pfingst v. Senn,* 94 Ky., 556, at the petition of twenty-five property owners refused an injunction where defendant purchased a lot in the neighborhood and proposed to re-open an old beer garden on which stood a dance-hall, band-stand and ten-pin alley, as such business was not in itself a nuisance. Yet where defendants conducted a beer garden in violation of state laws, and permitted persons of both sexes to gather on Sunday and other days, creating disorderly, indecent, and lascivious conduct, an adjoining property owner may be relieved against such misconduct by injunction. *Kissel v. Lewis,* 156 Ind., 233.

The diversification of modern social conditions has resulted in many decisions which demonstrate the apparently unlimited power of equity Courts in preventing by injunction mischief calculated

to produce irreparable mischief to an individual property owner. Thus games and sports which in themselves are forms of recreation and amusement to all who participate therein, may, when conducted in a disorderly and unlawful manner, necessitate the intervention of a Court of equity.

In *Thompson v. Behrman,* 37 N. J. Eq., 345, the court enjoined the defendant from keeping a shooting gallery open to the public until late at night, the smoke making it necessary for the plaintiffs to close the windows to their house, and the noise preventing them from sleeping. But plaintiff's bill for injunction was dismissed when the evidence showed that defendants played croquet by torch light in a vacant lot near plaintiff's residence, although the games lasted until eleven o'clock at night, and plaintiff's wife was pregnant and nervous and could not sleep on account of the noise and smoke without. *Akers v. Marsh,* 19 App. D. C., 28. But *Billington v. Miller,* 75 N. J. L., 415, presents an extreme illustration of the limit of equity jurisdiction. Under a city ordinance in Jersey City prohibiting the *sport* of roller skating on the streets, the Court held that merely travelling along the streets on skates was not prohibited under this ordinance, but where it was indulged in as a *sport* the Court would grant relief. So in *Harrison v. The People,* 101 Ill. App., 224, the mayor refused to grant a license to a person who intended opening a bowling alley in a section of town reserved almost exclusively for residence purposes, and where it appeared that such bowling alley would be operated with only a door between it and a saloon, both of which were in close proximity to churches, schools and residences. A petition for mandamus to compel the mayor to issue the license resulted in his action being upheld by the Court.

The great American sport, baseball, cannot be objected to ordinarily for gathering together hundreds and thousands of people whose cheers and yells during the game disturb the peace of the adjoining land owners. The Kentucky court in *Alexander v. Tabeau,* 24 Ky. L. R., 1305, dismissed plaintiff's bill for injunction where it appeared defendant had purchased land, erected stands and other conveniences for spectators, and proposed to have games of baseball played upon such land. It further held that baseball was not a nuisance *per se.* This doctrine finds application in practically every state. But if baseball games are conducted in such a manner that balls are batted into plaintiff's

yard, and there is riotous and indecent conduct accompanied by profanity on the part of players and spectators, the Court will enjoin such improper practices. *Cronin v. Bloemeche,* 58 N. J. Eq., 313. And the same Court in *Seastream v. The New Jersey Exhibition Co.,* 67 N. J. Eq., 178, extending the doctrine laid down in *Cronin v. Bloemeche supra,* held that Sunday games of baseball were detrimental to the value of real estate and a nuisance *per se.* Thereupon a preliminary injunction was issued against Sunday games until final hearing.

From the authorities cited it is evident that the Courts with practical unanimity are in accord with the principal case in holding that although the act complained of is not a nuisance *per se,* the circumstances under which it is done may necessitate the intervention of a Court of equity to prevent irreparable injury to the property rights of an individual. And if the act sought to be prohibited is in itself a nuisance, not dependent upon uncertainty, indefiniteness, and contingency, the Court exercising its discretionary power will grant an injunction.